THE PERMANENT COURT OF INTERNATIONAL JUSTICE

by

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INTRODUCTION

ON December 9, 1929 the American Chargé d'Affaires at Berne affixed the signature of the United States to the Protocol of Signature of the Permanent Court of International Justice, the Protocol of Accession of the United States, and the Protocol of Revision of the Statute of the Court. This action had been foreshadowed in President Hoover's message to Congress on December 3, 1929, in which he made the following statement:

> "In January 1926, the Senate gave its consent to adherence to The Court of International Justice with certain reservations. In September of this year the statute establishing the Court has, by the action of the nations signatory, been amended to meet the Senate's reservations and to go even beyond these reservations to make clear that the court is a true international court of justice. I believe it will be clear to everyone that no controversy or question in which this country has or claims an interest can be passed on by the Court without our consent at the time the question arises. The doubt about advisory opinions has been completely safeguarded. Our adherence to the International Court is, as now constituted, not the slightest step toward entry into the League of Nations. As I have before indicated, I shall direct that our signature be affixed to the protocol of adherence and shall submit it for the approval of the Senate with a special message at some time when it is convenient to deal with it."

The Protocol of 1920 which the President intends to submit to the Senate established a Court which differed fundamentally in character, composition and functions from any previously existing institution. Prior to 1920 the only agency for the adjudication of international disputes it had been found possible to create was the Permanent Court of Arbitration at The Hague, which was set up in 1899. This "Court" was merely a panel of judges from which States parties to a dispute could draw arbitrators whenever they chose to do so. The attempt made at the Second Hague Conference, 1907, to establish, in addition, a "Court of Arbitral Justice," met with failure, largely because of the inability of the several States to agree on the manner of electing the judges.

The framers of the Covenant of the League of Nations succeeded in incorporating into that instrument an article (Article 14) providing for the establishment of a Permanent Court of International Justice. In accordance with this article, the Council of the League, on February 13, 1920, appointed an Advisory Committee of Jurists to consider plans for the creation of such a Court.[1] This committee, composed of ten eminent jurists, including Mr. Elihu Root, former Secretary of State of the United States, convened at The Hague on June 16, 1920. The draft prepared by the committee was adopted in amended form by the Council in October 1920,[2] and submitted by it to the Assembly. The latter, on December 13, 1920, adopted a resolution approving the Statute of the Permanent Court of International Justice and establishing the procedure for its signature and ratification.[3]

1. League of Nations, *Verbatim Report of the Fifth Meeting of the Second Session of the Council of the League of Nations, London, February 13, 1920.* Geneva, 1921, p. 11.

2. League of Nations, *Procès-Verbal of the Tenth Session of the Council,* Annex 118a, p. 163. For the text of the draft prepared by the Advisory Committee of Jurists, cf. *The Records of the First Assembly, Meetings of the Committees, Third Committee,* Annex I, p. 411.

3. League of Nations, *The Records of the First Assembly, Plenary Meetings,* p. 500-501. The Protocol of Signature was opened at the Secretariat of the League in Geneva on December 16, 1920, and certified copies of the Protocol and adjoined Statute were sent to States Members of the League and States mentioned in the Covenant. By December 15, 1929, fifty-five States had signed the Protocol of Signature of the Statute, which remains open for signature by the States mentioned in the Annex to the Covenant. The signatory States are: Albania,

ORGANIZATION OF THE COURT

In September 1921 the Assembly and the Council elected the members of the Permanent Court of International Justice. The Court assembled at The Hague for a preliminary session on January 30, 1922. At that time it framed the rules[4] which now regulate its procedure, elected its President and Vice-President, and appointed its Registrar.

The fundamental law governing the activities of the Court is to be found in the Covenant of the League of Nations, the resolution of the Assembly of December 13, 1920, the Protocol of Signature and the Statute[5] accompanying this Protocol. The Statute is an international convention, and may be amended only by the States signatories of the Protocol. On December 14, 1928 the Council, in pursuance of a resolution adopted by the Assembly on September 20, 1928, appointed a Committee of Jurists to examine the question of the revision of the Statute.[6] This committee met in Geneva on March 11, 1929 and recommended a number of amendments which will be examined below.[7]

The Court has been described as a tribunal "in which a regular jurisprudence could develop, a Court strictly juridical and rigorously judicial, free from all preoccupations and all influence of a political nature: a Court of Justice in the narrow but clear and exact sense of the phrase."[8] Two main conditions were considered necessary for the existence of such a court: a permanent body of judges and continuity in the performance of their functions. In both these respects the Permanent Court of International Justice differs from the Permanent Court of Arbitration.

The Second Hague Conference, 1907, had been faced with the problem of electing judges to serve on a "Court of Arbitral Justice" in such a manner as to maintain the equality of States. The Advisory Committee of Jurists, faced by a similar problem in 1920, solved it "in an extremely precise and ingenious fashion."[9] Article 4 of the Statute provides that the members of the Court are to be elected for nine years by the Council and the Assembly from a list of persons nominated by the national groups in the Permanent Court of Arbitration;[10] the members of these groups, it must be noted, are appointed by their respective governments, and must be of high moral character and "recognized competence in questions of international law."[11] Equal and simultaneous election of the judges by the Council, in which the great powers have a preponderance, and the Assembly, where the small States are in a majority, is intended to establish a balance between the interests of both groups.[12]

At the request of Brazil, the Conference of Signatory States in September 1929 examined the conditions under which a State which has accepted the Statute of the Court, but is not a member of the League of Nations, may participate in the election of judges. It recommended that the Statute be amended to the effect that these conditions "shall, in the absence of a special agree-

Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Estonia, Ethiopia, Finland, France, Germany, Great Britain, Greece, Guatemala, Haiti, Hungary, India, Irish Free State, Italy, Japan, Jugoslavia, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Poland, Portugal, Rumania, Salvador, Siam, South Africa, Spain, Sweden, Switzerland, United States of America, Uruguay and Venezuela. All these States have ratified except Bolivia, Colombia, Costa Rica, the Dominican Republic, Guatemala, Liberia, Luxemburg, Nicaragua, Paraguay, Persia, Peru, Salvador and the United States of America.

4. The Rules of Court have been revised on two occasions—July 31, 1926 and September 7, 1927. Publications of the Permanent Court of International Justice, Series E, No. 4, *Fourth Annual Report, 1928*, p. 75-78, and Series D, No. 1, *Addendum*.

5. Publications of the Court, Series D, No. 1, *Statute of the Court*.

6. The resolution of the Assembly stated that, "considering the ever-increasing number of matters" referred to the Court, it was advisable to examine the provisions of the Statute "with a view to the introduction of any amendments which experience may show to be necessary."

7. The instrument which embodies the amendments recommended by the Committee of Jurists and adopted by the Conference of Signatory States is known as the Protocol concerning Revision of the Statute. It was approved by the Assembly on September 14, 1929.

8. Report presented by M. Léon Bourgeois, League of Nations, *Procès-Verbal of the Eighth Session of the Council*, Annex 89a, p. 165.

9. *Ibid.*, p. 167.

10. "In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes." (Article 4.)

11. *Hague Convention for the Pacific Settlement of International Disputes, 1907*, Article 44.

12. *Report on the Draft Scheme for the Establishment of the Permanent Court of International Justice . . .* presented to the Council of the League, on behalf of the Advisory Committee of Jurists, by M. Albert de Lapradelle. League of Nations, *The Records of the First Assembly, Meetings of the Committees*, p. 422, 427.

ment, be laid down by the Assembly on the proposal of the Council."[13]

COMPOSITION OF THE COURT

The Statute at present provides that the Court shall consist of fifteen members—eleven judges and four deputy-judges.[14] The Committee of Jurists in 1929 recommended that the office of deputy-judge be abolished, and that the number of ordinary judges be increased from eleven to fifteen.[15] This amendment was adopted by the Conference of Signatory States on September 4, 1929.[16]

The judges are to be elected regardless of their nationality "from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." The Statute prescribes that at every election "the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body should represent the main forms of civilization and the principal legal systems of the world." The members of the Court may not exercise any political or administrative function; an amendment adopted on September 14, 1929 provides in addition that they are not to "engage in any other occupation of a professional nature."[17] No member of the Court may act as agent, counsel or advocate in any case of an international nature. The members of the Court, when engaged in the performance of their functions, enjoy diplomatic privileges and immunities.

The qualifications of members of the Court were discussed by the press in September 1929, when Sir Cecil Hurst and M. Henri Fromageot, legal advisers respectively of the British and French Foreign Offices, were elected to succeed Lord Robert Finlay and M. André Weiss. No objections were advanced against either of the new judges on personal grounds. The fact, however, that both men had seen long years of administrative, as distinguished from judicial service, and had taken an active part in the drafting of treaties now in force, was regarded as depriving them of the disinterestedness which is the chief guarantee of continued confidence in the work of the Court.[18] Similar criticism has been expressed concerning Mr. Hughes, on the ground that he has not ceased to be closely associated with political affairs in the United States.[19] On the other hand, it may be argued that the Court benefits by the experience of men who have had a practical knowledge of international relations. This view is supported by the recommendation made by M. Fromageot in the Committee of Jurists and adopted by the Conference of Signatory States, to the effect that candidates should not only possess "competence" in international law, but "practical experience" as well.

The Statute provides that judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court. If the Court includes upon the bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. If the Court includes upon the bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge in accordance with the provisions of the Statute.[20]

The Court is to appoint every three years special chambers of five judges to hear and

13. League of Nations, *Question of the Revision of the Statute of the Permanent Court of International Justice: Report of the First Committee to the Assembly.* A. 50, 1929, V.

14. The Court is now composed as follows. Judges: Dionisio Anzilotti, President; Max Huber, former President; Dr. B. C. J. Loder; Didrik Nyholm; Charles Evans Hughes; Dr. Antonio S. de Bustamante; Rafael Altamira; Dr. Yorozu Oda; Epitacio de Silva Pessoa; Sir Cecil Hurst; Henri Fromageot. Deputy-Judges: Michel Yovanovitch; Frederik Beichmann; Demetre Negulesco and Wang Chung-Hui.

15. League of Nations, *Question of the Revision of the Statute of the Permanent Court of International Justice: Documents Communicated to the Assembly and the Council.* A. 9. 1929. V., p. 3.

16. League of Nations, *Revision of the Statute of the Permanent Court of International Justice, Protocol.* C. 492. M. 156. 1929. V., p. 15.

17. The Statute provides that the judges shall receive an annual indemnity and grants for the actual performance of their duties. The Committee of Jurists in 1929 came to the conclusion that "the requirements as to the selection of judges and rules regarding the other occupations which they may not follow concurrently having been more clearly stated," the judges should receive fixed annual salaries to be determined by the Assembly on the proposal of the Council. At the suggestion of the Committee of Jurists, the Assembly adopted a resolution in September 1929, fixing the annual salary of members of the Court at 45,000 Dutch florins (approximately $18,090).

18. "Va-t-on affaiblir la Cour?" *Journal de Genève,* September 11, 1929.

19. *The New Republic,* September 11, 1929, p. 83.

20. National judges have sat on the Court in the following cases: *S.S. Wimbledon* (German); *Mavrommatis Palestine Concessions* (Greek); *German Interests in Polish Upper Silesia* (German and Polish); *Case Concerning the Factory at Chorzow* (German and Polish); *S.S. Lotus* (Turkish). Cf. J. W. Wheeler-Bennett, *Information on the World Court, 1918-1928,* London, Allen and Unwin, 1929, p. 77, *et seq.*

determine labor cases and cases relating to transit and communications. The Statute provides that "with a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges,[21] who, at the request of the contesting parties, may hear and determine cases by summary procedure."

SESSIONS

The Statute provides that a session of the Court shall be held every year, beginning June 15. The Committee of Jurists in 1929 came to the conclusion that, in practice, the Court had been obliged to hold several extraordinary sessions annually, on account of the increase in cases referred to it. This fact, in the opinion of the committee, has tended "to bring the Court nearer to that permanent character which its title denotes, and which its promoters had contemplated in order to advance the progress of international justice." The committee recommended an amendment to the effect that the Court shall remain permanently in session except during judicial vacations. This amendment was adopted by the Conference of Signatory States.

The expenses of the Court are to be borne by the League of Nations "in such a manner as shall be decided by the Assembly upon the proposal of the Council." From each contribution paid by the Members of the League into the general funds the Court is granted a share corresponding to the proportion which its own budget bears to that of the League, it being understood that when necessary the Court may also be granted, in the same proportion, advances from the Working Capital Fund.[22]

JURISDICTION

The Court is open to Members of the League and to States mentioned in the Annex to the Covenant.[23] A resolution adopted by the Council on May 17, 1922 stipulates the conditions under which other States may appear before the Court.[24] The Court is not open to individuals or corporations.

Opinion differed, both in the Council and the Assembly, as to the extent of the jurisdiction which should be conferred on the Court. The Advisory Committee of Jurists, after careful consideration, pronounced itself in favor of compulsory jurisdiction in all cases of a "legal nature." The Council rejected this proposal. The Assembly reached the decision that, desirable as it would be to endow the Court with compulsory jurisdiction, such a step would be premature in view of the existing state of international relations.[25] Mr. Balfour and M. Bourgeois argued that acceptance of compulsory jurisdiction by the various States was contingent on their confidence in the work of the Court; such confidence, in turn, could develop only as a result of experience.[26] In spite of the protests of a number of Latin American States which favored the acceptance of unconditional compulsory jurisdiction, the Assembly gave its approval to Article 36 of the Statute, which provides only for optional acceptance of compulsory jurisdiction.

Article 36 falls into two parts, the first of which deals with what may be described as "voluntary jurisdiction," and the second with what may be regarded as "compulsory jurisdiction." The first paragraph provides that "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force." The procedure to be followed by the parties in submitting cases to the Court does not differ materially from that prescribed by arbitration treaties. The parties must conclude a special agreement (*compromis*) defining the subject-matter of the dispute, and notify the Court accordingly, before the machinery of judicial settlement can be set in motion.[27] The juris-

21. Five, according to the amendment adopted on September 14, 1929.

22. For the year 1929, the League of Nations allotted 2,234,725 Swiss francs (approximately $431,311.93) for the expenses of the Court.

23. The States mentioned in the Annex to the Covenant which do not belong to the League of Nations are Ecuador, Hedjaz and the United States of America.

24. Publications of the Court, Series D, No. 1, *First Annual Report*, p. 142. The States neither Members of the League of Nations nor mentioned in the Annex to the Covenant, which have been notified by the Court of the resolution of the Council, are as follows: Afghanistan, Danzig (through the mediation of Poland), Egypt, Georgia, Iceland, Liechtenstein, Mexico, Monaco, Russia, San Marino and Turkey.

25. Cf. remarks by M. Motta (Switzerland), League of Nations, *Records of the First Assembly, Plenary Meetings*, p. 490.

26. *Ibid.*, p. 489, 495.

27. Notice of the special agreement must be given by all the parties, unless it is expressly laid down in one of the clauses of the special agreement that the Court may take cognizance of the case upon notice being given by one party only.

diction exercised by the Court over such cases is "voluntary" in the sense that the parties to the dispute are not bound by a previous agreement to refer their differences to the Court.

The "matters specially provided for in Treaties and Conventions in force" are those questions which, by the terms of international agreements concluded since 1919, are to be submitted to "judicial settlement" or referred specifically to the Permanent Court of International Justice.[28] These agreements include the peace treaties; clauses in various treaties concerning the protection of minorities; mandates for various colonies and territories entrusted to certain Members of the League of Nations; general international agreements; political treaties (of alliance, commerce, navigation, etc.); various instruments and conventions concerning transit, navigable waterways and communications; treaties of arbitration and conciliation.[29]

THE "OPTIONAL CLAUSE"

The second paragraph of Article 36, which is known as the "optional clause," makes the following provision:

> "The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:
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> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach f an international obligation.
>
> "The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time."[30]

The effect of this clause is to confer "compulsory jurisdiction" on the Court under certain conditions, in certain cases and for a certain period of time. The jurisdiction exercised by the Court under the terms of this clause is "compulsory" in the sense that the States which have accepted the optional clause are bound to submit to the Court "legal disputes" concerning specified matters without concluding a previous agreement.

The Statute provides that, in the exercise of its jurisdiction, the Court is to apply: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision, however, does not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

JUDGMENTS

Cases may be brought before the Court either by the notification of the special agreement (*compromis*), or by a written application addressed to the Registrar.[31] In either case the subject of the dispute and the contesting parties must be indicated. The decision of the Court has no binding force except between the parties in respect of that particular case.[32]

28. Cf. Publications of the Court, Series D, No. 5, *Collection of Texts Governing the Jurisdiction of the Court*, 3rd ed. (1926).

29. For detailed tables of these agreements, cf. Publications of the Court, *Third Annual Report*, p. 40, *et seq.*, and *Fourth Annual Report*, p. 80, *et seq.*

30. By September 1, 1929, the following eighteen States had both signed and ratified the optional clause: Austria, Belgium, Bulgaria, Denmark, Estonia, Ethiopia, Finland, Germany, Haiti, Hungary, Netherlands, Norway, Panama, Portugal, Spain, Sweden, Switzerland and Uruguay. Costa Rica and Salvador have signed the optional clause without any condition as to ratification, but have not ratified the Protocol of Signature of the Statute. The Dominican Republic, Guatemala, Latvia, Liberia and Luxemburg have signed the clause, but have not yet ratified it. The period of time for which China and Lithuania signed the clause expired on May 13, 1927 and May 16, 1927, respectively. The following fifteen States signed the optional clause in September 1929: Czechoslovakia, France, Greece, Italy, Latvia, Nicaragua, Peru, Siam, the United Kingdom, Australia, Canada, India, New Zealand, the Union of South Africa and the Irish Free State.

One case has been submitted to the Court under the terms of the optional clause—the case involving the denunciation of the Sino-Belgian treaty of November 2, 1865, in which proceedings were instituted by unilateral application filed by the Belgian Government on November 25, 1926.

31. The latter procedure has so far been followed only in one case: the Belgian Government instituted proceedings by unilateral application in its dispute with China regarding the latter's denunciation of the Sino-Belgian treaty of 1865.

32. The Court has rendered sixteen judgments to date, the texts of which are published in Series A of the Publications of the Court (*Collection of Judgments*). The judgments are as follows: No. 1, *The S.S. Wimbledon;* No. 2, *The Mavrommatis Concessions in Palestine (jurisdiction);* Nos. 3 and 4, *Interpretation of the Treaty of Neuilly, Art. 179, Annex, Par. 4;* No. 5, *The Mavrommatis Concessions at Jerusalem (merits);* No. 6, *Certain German Interests in Upper Silesia (jurisdiction);*

Should a State consider that it has "an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party." The Court is at liberty to decide upon this request. Article 63 of the Statute provides:

> "Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
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> "Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."[33]

THE "LOTUS" CASE

The Court's procedure for receiving and deciding an international dispute is well illustrated by the *Lotus* case. On August 2, 1926 the French steamer *Lotus* collided on the high seas with the Turkish steamer *Boz-Kourt*, which sank with a loss of eight Turkish lives. The *Lotus* then proceeded to Constantinople, where her watch officer and the captain of the *Boz-Kourt* were prosecuted under Turkish law for negligent navigation and sentenced to fine and imprisonment. Diplomatic protests by the French government resulted in a special agreement between the two governments, signed October 12, 1926, which submitted to the Court the question whether Turkey had acted in conflict with the principles of international law; and if so, what reparation the French watch officer should receive.

France contended, among other things, that Turkey had violated international law by instituting proceedings under Article 6 of the Turkish Penal Code providing for punishment of foreigners who, having committed certain offenses abroad against Turkey or a Turkish subject, are arrested in Turkey, and claimed that French courts alone had criminal jurisdiction over the French watch officer. Turkey contended that Article 6 was in conformity with the principles of international law. On September 7, 1927, the Court rendered judgment that Turkey had not acted in conflict with the principles of international law. The Court consisted of twelve judges, whose votes were equally divided. Accordingly M. Huber, President of the Court, acting under Article 55 of the Statute, by a casting vote gave judgment in favor of Turkey. Judge John Bassett Moore concurred in the view that France did not have exclusive jurisdiction over the watch officer, but dissented from the judgment on the ground that the criminal proceedings, so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with certain well-settled principles of international law. The Court stated that in considering the case it did not limit itself to the arguments of the parties, but "included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement." The opinions rendered in this case revealed a divergence between Anglo-American and continental views regarding the extent of State jurisdiction.

ADVISORY OPINIONS

The Statute makes no specific provision regarding the competence of the Court to give advisory opinions. The original source of this competence is found in the last sentence of Article 14 of the Covenant, which provides that "the Court may give[34] an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." A number of jurists are of the opinion that this provision has been incorporated by reference into the Statute of the Court, Article 1 of which states that the Court has been established "in accordance with Article 14 of the Covenant."[35]

No. 7, *Certain German Interests in Upper Silesia (merits)*; No. 8, *Claim for Indemnity in Respect of the Factory at Chorzow (jurisdiction)*; No. 9, *Case of the Lotus*; No. 10, *Case of the Readaptation of the Mavrommatis Jerusalem Concessions*; No. 11, *Interpretation of Judgments No. 7 and 8 (Case Relating to the Factory at Chorzow)*; No. 12, *Case Relating to Certain Rights of Minorities in Upper Silesia (Minority Schools)*; No. 13, *Case Concerning the Factory at Chorzow (merits)*; No. 14, *Case of Serbian Loans issued in France*; No. 15, *Case of Brazilian Loans Issued in France*; and No. 16, *Free Zones of Upper Savoy and District of Gex*. Acts and documents relating to both judgments and advisory opinions are published in Series C of the Publications of the Court.

33. Under the terms of this article the Polish government was permitted to intervene in the case of the *S.S. Wimbledon*. Publications of the Court, Series E, No. 1.

34. French text, *donnera*.

35. Cf. Judge Loder, Publications of the Court, Series D, No. 2, p. 502; M. O. Hudson, *The Advisory Opinions of the Permanent Court of International Justice*, International Conciliation, 1925, No. 214. Article 36 of the Statute states, in addition, that the jurisdiction of the Court extends to "all matters specially provided for in treaties and conventions in force"; these are understood to include the provisions of the Covenant.

The Court is not bound to give advisory opinions. In the case of Eastern Carelia the Court did, in fact, decline to render an opinion, after it had made a careful examination of the circumstances.[36]

The procedure governing advisory opinions is set forth in the Rules of Court (Articles 71-74). The Committee of Jurists in 1929 recommended the addition to the Statute of a new chapter incorporating the essential portions of these articles of the Rules of Court. This recommendation was adopted by the Conference of Signatory States on September 4, 1929.

Questions upon which the advisory opinion of the Court is desired are laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League, under instructions from the Assembly or the Council.[37]

PROCEDURE

The procedure to be followed by the Council in deciding to request the Court for an advisory opinion has been the subject of much controversy. Neither the Statute nor the Rules of Court make any provision in this matter. Article 5 of the Covenant provides that except on "matters of procedure," which include "the appointment of committees to investigate particular matters," the decisions at any meeting of the Assembly or of the Council shall require the agreement of all Members of the League represented at the meeting. Unless, therefore, requests for advisory opinions are regarded as "matters of procedure,"[38] it may be assumed that they require unanimity on the part of the Council. It is not clear, however, that if unanimity is required, it is to be absolute unanimity or the qualified unanimity specified in Article 15, Paragraph 6 of the Covenant, which would make it unnecessary to count the votes of representatives of the parties to a dispute. The Court gave some support to the latter interpretation when it expressed the following view in the Iraq case:

> "The Court is of opinion,
>
> "(1) that the 'decision to be taken' by the Council of the League of Nations in virtue of Article 3, paragraph 2 of the Treaty of Lausanne, will be binding on the Parties and will constitute a definitive determination of the frontier between Turkey and Iraq;
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> "(2) that the 'decision to be taken' must be taken by a unanimous vote, the representatives of the Parties taking part in the voting, but their votes not being counted in ascertaining whether there is unanimity."[39]

Upon receipt of the request for an advisory opinion, the Registrar shall forthwith give notice of it to the members of the Court, to the Members of the League of Nations (through the Secretary-General of the League), and to any States entitled to appear before the Court. In the case of Eastern Carelia the Court ruled that, when a dispute involves a State which is not a Member of the League (in this instance, Russia), the Court can render an opinion only with the consent of that State. Russia having declined to give its consent, the Court found it "impossible to give its opinion on a dispute of this kind."[40]

NATIONALITY DECREES, TUNIS—MOROCCO

A brief examination of the advisory opinion rendered by the Court regarding the Tunis-Morocco nationality decrees may serve to illustrate the manner in which requests for advisory opinions may come before the Court, and the procedure followed by the Court in reaching its conclusions. On August 11, 1922, at the request of the British government, the following question was

36. Cf. below.

37. The Court has rendered sixteen advisory opinions: Appointment of Dutch workers' delegate to the Third Labor Conference (Advisory Opinion No. 1); Competence of the International Labor Organization in regard to agriculture (Advisory Opinions Nos. 2 and 3); Nationality decrees in Tunis and Morocco (Advisory Opinion No. 4); The Status of Eastern Carelia (Advisory Opinion No. 5); Settlers of German Origin in the Territory Ceded by Germany to Poland (Advisory Opinion No. 6); Acquisition of Polish Nationality (Advisory Opinion No. 7); Questions of Jaworzina and Saint-Naoum (Advisory Opinions Nos. 8 and 9); Exchange of Greek and Turkish Populations (Advisory Opinion No. 10); Polish Postal Service at Danzig (Advisory Opinion No. 11); Frontier Between Turkey and Iraq (Advisory Opinion No. 12); Competence of the International Labor Organization to Regulate Incidentally the Personal Work of the Employer (Advisory Opinion No. 13); Jurisdiction of the European Commission of the Danube between Galatz and Braila (Advisory Opinion No. 14); Jurisdiction of the Courts of Danzig (Advisory Opinion No. 15); Interpretation of the Greco-Turkish Agreement of December 1, 1926 (Advisory Opinion No. 16). The texts of all advisory opinions are published in Series B of the Publications of the Court (*Collection of Advisory Opinions*).

38. Cf. argument presented by M. Denichert (Switzerland) at the Conference of States Signatories of the Protocol, September 1926, when he said that an advisory opinion was a question of procedure, "because the opinion did not amount to a decision."

39. Publications of the Court, Series B, Advisory Opinion No. 12, p. 33.

40. *Ibid.*, Advisory Opinion No. 5, p. 27-28.

placed on the agenda of the Council of the League of Nations:

"Dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects, the French government having refused to submit the legal questions involved to arbitration."

On October 4, 1922 the Council, having examined the proposals made by the representatives of France and Great Britain, adopted a resolution referring to the Court for its opinion "the question whether the dispute referred to above is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)." The Council noted that the two governments had agreed that, if the opinion of the Court on the above question was that it was not solely a matter of domestic jurisdiction, the whole dispute would be referred to arbitration or to judicial settlement under conditions to be agreed upon by the governments. In execution of this resolution, the Secretary-General of the League presented the request of the Council to the Court, submitting at the same time a copy of the memorandum by which the matter was originally brought before the Council.

In compliance with the terms of the resolution, the President of the Court communicated with the British and French governments, which submitted cases and counter-cases. In January 1923 oral statements were made to the Court by jurists representing the two governments. The Court, in the course of the hearings, examined the nationality decrees which formed the subject of the dispute; the diplomatic correspondence which had been exchanged with regard to them; and the agreements into which the two States had entered at various times concerning the status of Tunis and Morocco. The Court expressed the opinion that in the present state of international law questions of nationality are generally domestic questions, but that this is not so where, as in the present case, such questions are regulated by an international agreement. The Court therefore answered the Council's question in the negative. Great Britain and France subsequently effected an amicable adjustment of the dispute.

RECORD OF THE COURT

The essential problem with which the Court was faced from the first concerned the duality of its functions as outlined in Article 14 of the Covenant. Should it act both as a judicial tribunal, rendering public judgments, and as a non-judicial adviser, giving private opinions to political bodies such as the Council and Assembly?

The Court has never undertaken to give confidential legal advice to the Council or the Assembly, nor, under its rules, is it in a position to do so. For such advice the Council has addressed itself to special committees of jurists, set up from time to time.[41] In practice, the Court has assimilated its advisory procedure to its contentious procedure. The flexibility of the advisory procedure and the fact that advisory opinions are not binding on the parties to a dispute have enabled States "to ask for the submission of their differences to the Court in the form of a request for an advisory opinion" when they were "for various reasons unwilling to submit it in the form of international litigation."[42] The Committee of Jurists expressed itself in favor of retaining the system of advisory opinions, on the ground that "the system of asking the Court for an advisory opinion has proved to be of substantial utility in securing a solution of the questions which could not conveniently be submitted to the Court in any other form."[43]

It may be seen from the preceding analysis that the Permanent Court of International Justice is a judicial body established by the States signatories of the Protocol of 1920. The jurisdiction of the Court, limited at present by the provisions of Article 36, has been gradually widened: a majority of the treaties and conventions concluded since 1919 provide for reference of disputed points to the Court, and forty-two States have accepted the optional clause on various conditions and for various

41. Cf. remarks of M. Scialoja, *Minutes of the Committee of Jurists*, p. 12; P. C. Jessup, *The United States and the World Court*, World Peace Foundation, p. 29.

42. *Report Adopted by the Committee of Jurists on the Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Court, Minutes of the Committee of Jurists, 1929*, Annex II, p. 130.

43. *Ibid.*

periods of time. The Court has followed a judicial procedure with respect both to judgments and advisory opinions, and has at no time acted as counsel to any one of the organs of the League. The advantages offered by the Court as compared with arbitral tribunals have been summarized by Mr. Hughes as follows:

> "The choice is plainly between arbitrators selected for a particular case or a permanent international court. . . .
>
> "So far as the particular controversy is concerned, it may be decided by either sort of tribunal, but a permanent court is needed from the standpoint of law and in the interests of nations contemplating an unbroken peace under the reign of law. . . .
>
> "I believe that a bench of judges, chosen by the nations on behalf of their repute as jurists, set aside for continuous judicial work, at an age when ambition as well as conscience prompts to the best work of which they are capable, will be far more satisfactory in the long run than the choice of arbitrators from time to time."[44]

THE UNITED STATES AND THE COURT

For over half a century the United States has advocated the establishment in some form of a Permanent Court of International Justice. Nevertheless, this country has failed as yet to ratify the Protocol of 1920. This fact has not precluded the participation of a number of American jurists in the work of the Court. Mr. David Hunter Miller took an active part in the drafting of Article 14 of the Covenant. Mr. Elihu Root, former Secretary of State of the United States, participated in the work of the Advisory Committee of Jurists, and largely contributed to the successful completion of its labors. Mr. John Bassett Moore was elected a member of the Court in 1922 and was succeeded upon his resignation in 1928 by Mr. Charles Evans Hughes. Finally, Mr. Root took part in March 1929 in the work of the Committee of Jurists constituted to study proposed amendments to the Statute of the Court.

The United States, as one of the States mentioned in the Annex to the Covenant, received from the Secretary-General of the League of Nations a certified copy of the Protocol of 1920. The Secretary of State of the United States acknowledged receipt of this instrument on August 15, 1921. On February 24, 1923 President Harding submitted the Protocol and the accompanying Statute of the Court to the Senate, with a request for its consent to American adherence, subject to four "conditions and understandings" set forth in an attached letter from Secretary of State Hughes, dated February 17, 1923.[45] President Coolidge, in his address of December 6, 1923, commended Mr. Harding's proposal to the Senate. On May 26, 1924 Senator Pepper presented a report from the Committee on Foreign Relations endorsing this proposal, but suggesting radical amendments to the Statute. The minority of the Committee submitted a report embodying a resolution introduced by Senator Swanson, which followed the main lines of the Harding-Hughes proposal. The platforms of both the Republican and Democratic parties endorsed the Court in 1924. On December 3, 1924 President Coolidge again drew the attention of the Senate to the Harding-Hughes proposal, stating, however, that "our country shall not be bound by advisory opinions which may be rendered by the court upon questions which we have not voluntarily submitted for its judgment."

In his inaugural address on March 4, 1925 President Coolidge advocated adherence to the Court, adding that "we ought not to withhold our own sanction because of any small and inessential difference." On March 5 Senator Swanson reintroduced his resolution at the special session of the Senate, with an addition incorporating President Coolidge's suggestion in the following terms:

> "5. That the United States shall be in no manner bound by any advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory."

On March 13 the Senate voted to consider the Swanson resolution in open executive session on December 17.

44. Address before the American Society of International Law, April 24, 1929. *Proceedings*, 1929, p. 1.

45. *American Journal of International Law*, Vol. 17, October 1923, p. 331-343.

On December 8, 1925 President Coolidge again endorsed the Court in his annual message, and on December 17 Senator Swanson opened debate on the subject, which continued until January 25, 1926, when the cloture rule was put in effect by a two-thirds vote.

SENATE RESERVATIONS OF 1926

During the debate emphasis was placed on the position of the United States with regard to advisory opinions. Opposition to the advisory function of the Court was voiced by Senators Borah, Moses and others. Senator Pepper suggested the adoption of reservations or amendments on three specific points—viz.: that advisory opinions should be rendered publicly; that the principle established by the Court in the Eastern Carelia case should be safeguarded by a reservation; and that no opinion in any matter "directly affecting the United States" should be rendered by the Court without the consent of the United States. On January 27, 1926 the Senate adopted the following resolution:[46]

"Whereas the President, under date of February 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the Protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence: Therefore be it

"*Resolved (two-thirds of the Senators present concurring)*, That the Senate advise and consent to the adherence on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

"1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Treaty of Versailles.

"2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice or for the filling of vacancies.

"3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

"4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

"5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

"The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

"*Resolved further*, As a part of this act of ratification, that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

"*Resolved further*, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

On March 2, 1926 Secretary of State Kellogg forwarded a copy of the Senate resolution to the Secretary-General of the League of Nations and to all States signa-

46. *Congressional Record*, Vol. 67, p. 2306; Senate Document 45, 69th Congress, 1st Session.

tories of the Protocol, requesting the latter to inform him in writing "whether they will accept the conditions, reservations and understandings contained" therein. At a meeting of the Council held in March 1926, Sir Austen Chamberlain, British representative, stressed the fact that the United States desired to make certain modifications in a multilateral instrument, and that consequently a new agreement was necessary. As a result of the discussion, the Council adopted a resolution proposing to the governments of the signatory States and to the United States that they should send delegates to a conference whose duty it would be to solve the problems raised by the reservations of the United States. Invitations to this effect were sent on March 29.[47] On April 17 Secretary Kellogg declined for the United States on the ground that the Senate reservations "are plain and unequivocal, and according to their terms, they must be accepted by the exchange of notes between the United States and each one of the forty-eight States signatory to the Statute before the United States can become a party and sign the Protocol." He was of the opinion that no new agreement was necessary, but that acceptance of the American reservations by the signatories would constitute such an agreement. The United States had no objection, however, to the signatories' conferring among themselves if they so wished.[48]

CONFERENCE OF SIGNATORY STATES, 1926

The conference of States signatories of the Protocol met in Geneva on September 1, 1926.[49] The President, Jonkheer van Eysinga, stated that, desirous as the conference might be to give satisfaction to the wishes of the United States, "it could not lose sight of the fact that the constitutional law of the League of Nations also had its exigencies"; it was the task of the conference "to endeavor to reconcile the wishes of the United States with that constitutional law."

47. *Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, September 1-23, 1926.* V. Legal. 1926. V. 26, Annex 5, p. 70.

48. *Ibid.*, Annex 6, p. 71.

49. The conclusions of the Conference were embodied in a Final Act and a Preliminary Draft of a Protocol.

FIFTH RESERVATION OF THE SENATE

The first four reservations of the United States were accepted by the conference without discussion. The Final Act of the conference specified with respect to the first part of the fourth reservation, that, "in order to assure equality of treatment, it seems natural that the signatory States acting together and by not less than a majority of two-thirds, should possess the corresponding right to withdraw their acceptance of the special conditions attached by the United States to its adherence" to the Protocol.

The first part of the fifth reservation aroused no discussion. The conference agreed that Articles 73-74 of the Rules of Court, as amended on July 31, 1926, "satisfy the desiderata named by the United States." Likewise it was agreed that the case of Eastern Carelia, in which the Court had held that no advisory opinion dealing with the substance of a dispute between a State Member of the League and a non-Member State could be given without the consent of the latter, adequately covered "any dispute or question in which the United States has . . . an interest."

The conference was not clear, however, as to the meaning and scope of the reservation that the Court should not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States "claims an interest." The conference assumed, for the purposes of the discussion, that the United States did not desire a privileged position, but only equality of treatment with States Members of the Council (or Assembly). The conference could not agree on the essential question whether unanimity is required in the Council (or Assembly) when requesting the Court for an advisory opinion, or whether a majority is sufficient.[50] If unanimity is required, every State represented on the Council (or in the Assembly) is in a position to exercise a veto, and the United States would be entitled to a similar position. If, however, a majority is sufficient, the United States,

50. M. Rolin suggested that the conference should recommend to the Council that "the question should be cleared up by asking the Permanent Court for an advisory opinion." This suggestion, however, was not adopted.

under the terms of the fifth reservation, would be seeking a position more favorable than that enjoyed by other States. The Final Act of the conference stressed the uncertainty which still prevails regarding the procedure of the Council when requesting advisory opinions, but added that "in any event the United States should be guaranteed a position of equality in this respect." The Final Act noted the great importance attached by Members of the League to the value of advisory opinions, and expressed the hope that the United States "entertains no desire to diminish the value of such opinions in connection with the functioning of the League of Nations."

The conference found it difficult to determine the scope of the word "interest." The wording of the fifth reservation appeared to leave the determination of the claim of "interest" solely to the United States. What procedure should be followed to ascertain the views of the United States? Should the United States address itself to the Court or to the Council? If the latter, should it do so before or after the Council had decided to request the Court for an advisory opinion? The conference reached no agreement on this point. The Final Act stated that the procedure to be followed by a non-Member State with respect to requests for advisory opinions was a matter of importance, and that it was desirable in consequence that it should form the object of a supplementary agreement. The Preliminary Draft of a Protocol provided that this matter would be the subject of "an understanding to be reached by the Government of the United States and the Council of the League of Nations."

DRAFT PROTOCOL OF 1926

The conference recommended that all States signatories of the Protocol of 1920 should adopt the Preliminary Draft of a Protocol in replying to the proposal made by the United States. Twenty-four of the States adopted the recommendations of the conference, and communicated with the government of the United States in the manner suggested.[51]

For two and a half years the United States took no official action, either affirmatively or negatively, with regard to the Preliminary Draft of a Protocol. On February 19, 1929, Secretary Kellogg addressed a letter to the Secretary-General of the League,[52] in which he said that "the government of the United States desires to avoid in so far as may be possible any proposal which would interfere with or embarrass the work of the Council of the League of Nations, doubtless often perplexing and difficult," and that "it would be glad if it could dispose of the subject by a simple acceptance of the suggestions embodied in the Final Act and Draft Protocol adopted at Geneva on September 23, 1926. There are, however, some elements of uncertainty in the bases of these suggestions which seem to require further discussion." He referred particularly to the fact that the powers of the Council and its modes of procedure depend upon the Covenant of the League, which may be amended at any time. The ruling of the Court in the Eastern Carelia case and the Rules of Court are likewise subject to change at any time. He suggested an informal exchange of views for the purpose of reaching an agreement on these points:

> "Possibly the interest of the United States thus attempted to be safeguarded may be fully protected in some other way or by some other formula. The Government of the United States feels that such an informal exchange of views as is contemplated by the twenty-four Governments should, as herein suggested, lead to an agreement upon some provision which in unobjectionable form would protect the rights and interests of the United States as an adherent to the Court Statute, and this expectation is strongly supported by the fact that there seems to be but little difference regarding the substance of these rights and interests."

President Hoover, in his inaugural address on March 4, 1929, endorsed the Court in the following terms:

> "American statesmen were among the first to propose and they have constantly urged upon the

51. These States were Australia, Belgium, Czechoslovakia, Denmark, Estonia, France, Great Britain, Hungary, India, Irish Free State, Italy, Japan, Jugoslavia, Netherlands, New Zealand, Norway, Poland, Portugal, Rumania, Siam, South Africa, Spain, Sweden and Switzerland. The following five States accepted the proposals of the United States without condition: Albania, Cuba, Greece, Liberia and Luxemburg. Brazil, the Dominican Republic and Uruguay have indicated that they would accept but have not formally notified the United States of their acceptance. Fifteen States simply acknowledged receipt of Secretary Kellogg's note of February 12, 1926.

52. League of Nations, *Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes of the Sessions held at Geneva, March 11-19, 1929,* Annex 2, p. 96.

world, the establishment of a tribunal for the settlement of controversies of a justiciable character. The Permanent Court of International Justice in its major purpose is thus peculiarly identified with American ideals and with American statesmanship. No more potent instrumentality for this purpose has been conceived and no other is practicable of establishment.

"The reservations placed upon our adherence should not be misinterpreted. The United States seeks by these reservations no special privilege or advantage, but only to clarify our relation to advisory opinions and other matters which are subsidiary to the major purposes of the Court. The way should, and I believe will, be found by which we may take our proper place in a movement so fundamental to the progress of peace."

RE-WRITING THE PROTOCOL

At the suggestion of Sir Austen Chamberlain the Council, on March 9, 1929, decided to request the Committee of Jurists, which had been appointed on December 14, 1928 to study the question of eventual amendment of the Statute of the Court, to examine at the same time the question of the accession of the United States to the Court. Sir Austen Chamberlain regarded it as a most fortunate circumstance "that among the gentlemen who had accepted the invitation of the Council to serve on that Committee was the very eminent jurist and statesman, Mr. Elihu Root, than whom no one could be more competent to assist the Committee in its task, since he was himself one of the framers of the Statutes of the Court." The Council requested the Secretary-General of the League to send minutes of this discussion to the government of the United States through the American Legation at Berne.[53]

The Committee of Jurists met in Geneva on March 11, 1929, with M. Scialoja as chairman.[54] The committee had before it the official letter addressed by Secretary Kellogg to the Secretary-General of the League, and a draft project submitted to the committee by Mr. Root. The draft project contained suggestions which Mr. Root "was submitting in his own name, as to the way in which it might perhaps be possible to bring the provisions of the Final Act of the Conference of September 1926 . . . and adopted by the majority of States signatories of the Protocol of the Court, into line with the reservations made by the United States Senate . . . in regard to the accession of the United States to the Protocol of the Court."

Mr. Root's proposal, which is known as the "Root formula,"[55] attempted to deal with the problem of advisory opinions in a concrete form, and to avoid theoretical discussion of the constitutional organization of the League. It provided, in the first place, for a definite statement of the principle expressed by the Court in the case of Eastern Carelia.

"The Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is a party."

In the second place, it outlined the procedure to be adopted with regard to advisory opinions concerning disputes or questions in which the United States claimed to have an "interest."

THE "ROOT FORMULA"

Mr. Root's formula embodied the substance of the second part of the fifth reservation:

". . . the Court shall not, without the consent of the United States, render an advisory opinion touching any dispute to which the United States is not a party but in which it claims an interest or touching any questions other than a dispute in which the United States claims an interest."

The procedure devised by Mr. Root contemplated two stages in the process of requesting the Court for an advisory opinion —the preliminary discussion of a request in the Council or Assembly, and the receipt of a request by the Court. In the first eventuality, the Council or Assembly, should either of them find it desirable, may invite an exchange of views with the United States and such exchange of views is then to proceed "with all convenient speed." In the second eventuality, the Registrar of the Court shall notify the United States, among other States mentioned in Article 73 of the Rules of Court,

". . . stating a reasonable time-limit fixed by the President within which a written statement

53. League of Nations, *Official Journal, Minutes of the Fifty-Fourth Session of the Council*, Geneva, March 4-9, 1929, p. 564-565.

54. The conclusions of the committee were embodied in a Draft Protocol for the Accession of the United States.

55. League of Nations, *Minutes of the Committee of Jurists, 1929*, cited.

by the United States concerning the request will be received.

"In case the United States shall, within the time fixed, advise the Court in writing that the request touches a dispute or question in which the United States has an interest and that the United States has not consented to the submission of the question, thereupon all proceedings upon the question shall be stayed to admit of an exchange of views between the United States and proponents of the request, and such exchange of views shall proceed with all convenient speed."

The Root formula provided for the contingency that, after an exchange of views had taken place, either while a request was still under discussion or after it had been submitted to the Court, it might appear that no agreement could be reached as to whether the question affected an interest of the United States. If, under these circumstances, the submission of the request was still insisted upon "after attributing to the objections of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council," and if the United States was not prepared to forego its objection in that particular instance,

". . . it shall be deemed that, owing to a material difference of view regarding the proper scope of the practice of requesting advisory opinions, the arrangement now agreed upon is not yielding satisfactory results and that the exercise of the powers of withdrawal . . . will follow naturally without any imputation of unfriendliness or of unwillingness to co-operate generally for peace and goodwill."

The Root formula succeeded in overcoming the three difficulties which had appeared insuperable at the conference of 1926. It carefully avoided any discussion of the general and abstract question whether the Council must vote unanimously when requesting the Court for an advisory opinion, or only by a majority. It practically eliminated the necessity of reaching a decision on this point by providing that the United States might exercise the power of withdrawal in case of failure to agree as to whether a given question does touch an interest of the United States. Finally, and most important of all, it outlined the manner in which an exchange of views might take place between the United States, on the one hand, and the Council or Court on the other.

The discussion of the Root formula by the Committee of Jurists revealed no fundamental difference of opinion. M. Scialoja took occasion to point out that it would be to the interest of the Council to retain the United States on the Court; the United States, he thought, might consequently, by the possibility of withdrawal, "exercise what would, in practice, be a kind of moral pressure on the Council." He feared, moreover, that other States which had not yet adhered to the Court, for instance Russia, might claim privileges similar to those accorded to the United States.

DRAFT PROTOCOL OF 1929

Sir Cecil Hurst, who had also submitted proposals for redrafting Article 4 of the Protocol of 1926, suggested modification of the procedure elaborated by the Root formula, with a view to notifying the United States of proposals for obtaining an advisory opinion from the Court at the time of their introduction, rather than "in contemplation of a request for an advisory opinion." This suggestion was adopted by the Committee of Jurists,[56] and embodied in Article 5, Paragraph 1 of the Draft Protocol:[57]

"With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and he United States."

The Committee of Jurists reached the conclusion "that it was useless to attempt to allay the apprehensions on either side . . . by the elaboration of any system of paper guarantees or abstract formulae." It viewed as more hopeful the system of dealing with

56. *Report Adopted by the Committee of Jurists on the Question of the Accession of the United States of America to the Protocol of Signature of the Statute of the Court* (Rapporteur, Sir Cecil Hurst), *Minutes of the Committee of Jurists, 1929*, cited, Annex 11, p. 130.

57. The Draft Protocol is published as an Appendix to the Minutes of the Committee of Jurists, p. 132. Cf. Appendix, p. 409.

each problem in a concrete form, and providing some method "by which questions as they arise may be examined and views exchanged, and a conclusion reached after each side has made itself acquainted with the difficulties and responsibilities which beset the other."

Following the report of the work of the Committee of Jurists, presented by M. Scialoja on June 11, 1929, the Council on June 12 adopted the report of the committee and the Draft Protocol. It instructed the Secretary-General of the League to reply to Secretary Kellogg's note of February 19, 1929, to communicate the texts of the report of the Committee of Jurists and of the Draft Protocol to the government of the United States, and to make a similar communication to the States signatories of the Protocol of December 16, 1920. The Council, moreover, instructed the Secretary-General to transmit these documents to the Assembly and to place the question on the supplementary agenda of the tenth session of the Assembly, to be held at Geneva in September 1929.[58] At the suggestion of M. Scialoja, the Council adopted a resolution to convoke a conference of States parties to the Statute to meet at Geneva on September 4, 1929, with a view to examining the amendments to the Statute and the recommendations formulated by the Committee of Jurists.

CONFERENCE OF SIGNATORY STATES, 1929

On August 31 the Council adopted a resolution inviting the Conference of Signatory States to examine the subject of the accession of the United States to the Court, as well as the proposed amendments to the Statute. The First Committee of the Assembly considered this resolution on September 3, and expressed the opinion that the question of accession of the United States should be examined by the Conference of Signatory States prior to its discussion in the Assembly. The conference met on September 4, and at its second meeting on that day unanimously adopted the Draft Protocol for the Accession of the United States. At the first meeting the delegates had been informed by the Secretary-General of the League that the Draft Protocol was considered satisfactory by the United States, but that no official announcement could be made at that time. The Department of State confirmed this report on the same day, stating that on August 14 the American Minister to Switzerland had presented an *aide-mémoire* to the Secretary-General of the League. This document stated that, after careful examination, the Secretary of State considered that the Draft Protocol "would effectively meet the objections represented in the reservations of the United States Senate, and would constitute a satisfactory basis for the adherence of the United States to the Protocol and Statute of the Permanent Court of International Justice"; after the Draft Protocol had been accepted by the signatory States, the Secretary of State would "request the President of the United States for the requisite authority to sign" and would "recommend that it be submitted to the Senate for its consent to ratification."

The First Committee of the Assembly on September 13 unanimously adopted the Draft Protocol, which was approved by the Assembly on September 14, and signed without delay by forty-nine States.[59] The Protocol is to come into force as soon as all States which have ratified the Protocol of December 16, 1920, and also the United States, have deposited their ratifications.

The President of the Conference of Signatory States, in a letter addressed to the Assembly of the League of Nations, pointed out that three instruments relating to the Court would be presented for acceptance to the United States: (1) the Draft Protocol for the Accession of the United States; (2) the Protocol of Signature of 1920; and (3) the new Protocol of Revision of the Statute. He expressed the hope that "the United States will in due course sign and ratify all three above-mentioned instruments." The Protocol concerning the amendment of the Statute provides that it will enter into force on September 1, 1930, provided that the

58. League of Nations, *Question of the Revision of the Statute of the Permanent Court of International Justice*, A. 11, 1929. V., p. 5.

59. Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Great Britain, Greece, Guatemala, Haiti, Hungary, India, Irish Free State, Italy, Japan, Jugoslavia, Latvia, Liberia, Luxemburg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Rumania, Salvador, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay and Venezuela.

Council of the League of Nations has satisfied itself that those Members of the League of Nations and States mentioned in the Annex to the Covenant which have ratified the Protocol of December 16, 1920, and whose ratification of the present Protocol has not been received by that date, "have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present Protocol." For the purpose of this Protocol, the United States is to be in the same position as a State which has ratified the Protocol of December 16, 1920.[60]

SIGNATURE BY THE UNITED STATES

On November 18, 1929 Secretary of State Stimson addressed a letter to President Hoover, in which he summarized the considerations involved in the question of the adherence of the United States to the Protocol of 1920. He expressed the opinion that both the Draft Protocol of Accession and the Protocol for the Revision of the Statute fully safeguarded the interests of the United States, and met the objections of the Senate to the rendering of advisory opinions by the Court. He stressed the fact that, as a result of the conclusion of the Kellogg pact, "the need of developing judicial means instead of war to settle the inevitable controversies between nations" had become more pressing and that it was more important than ever before "to establish and clarify the standards and rules of international conduct by which such controversies can be prevented or minimized." The Permanent Court of International Justice would, he believed, "perforce take a vital part" in the development of international law. "In this work, protected as they are now protected, advisory opinions rendered on questions before they have ripened into bitter quarrels and wounded pride, can play a most useful part." In conclusion, he advised the President that, in his opinion, the United States could now safely adhere to the Permanent Court of International Justice. On November 26, 1929 President Hoover authorized Mr. Stimson to make the necessary arrangements for the signature on behalf of the United States of the three protocols submitted by the Secretary-General of the League of Nations.

CONCLUSION

It now remains for the President to present the three protocols to the Senate for ratification. The President, however, appears to favor postponement of action on the Court until after the London Naval Conference, presumably because of his reluctance to antagonize such opponents of the Court as Senators Borah and Moses. Further delay in the matter of the Court is opposed in many quarters, on the ground that no time could be more propitious than the present, when public opinion has again been aroused on the subject. It is claimed, moreever, that the ratification of the protocols would give practical evidence of the avowed desire of the United States for world peace, and, by assuring other States of this country's real interest in the further development of peace machinery, would facilitate acceptance by them of the American program of naval disarmament.

60. By December 15, 1929, the Protocol of Revision of the Statute had been signed by the following forty-nine States: Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Czechoslovakia, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Great Britain, Greece, Guatemala, Haiti, Hungary, India, Irish Free State, Jugoslavia, Latvia, Liberia, Luxemburg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Poland, Portugal, Rumania, Salvador, Siam, South Africa (Union of), Spain, Sweden, Switzerland, United States of America, Uruguay and Venezuela.

APPENDIX I

Draft Protocol for the Accession of the United States

Adopted by the Committee of Jurists, March 19, 1929.

The States signatories of the Protocol of Signature of the Permanent Court of International Justice, dated December 16th, 1920, and the United States of America, through the undersigned duly authorized representatives, have mutually agreed upon the following provisions regarding the adherence of the United States of America to the said Protocol, subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27th, 1926.

ARTICLE 1

The States signatories of the said Protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said Protocol upon the terms and conditions set out in the following Articles.

ARTICLE 2

The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory States Members of the League of Nations represented in the Council or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.

ARTICLE 3

No amendment of the Statute of the Court may be made without the consent of all the Contracting States.

ARTICLE 4

The Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Articles 73 and 74 of the Rules of Court.

ARTICLE 5

With a view to ensuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary-General of the League of Nations shall, through any channel designated for that purpose by the United States, inform the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or Assembly of the League and the United States.

Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of Court, stating a reasonable time-limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such request should have been afforded and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, proceedings shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.

With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

If, after the exchange of views provided for in paragraphs 1 and 2 of this Article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to co-operate generally for peace and goodwill.

ARTICLE 6

Subject to the provisions of Article 8 below, the provisions of the present Protocol shall have the same force and effect as the provisions of the Statute of the Court and any future signature of the Protocol of December 16th, 1920, shall be deemed to be an acceptance of the provisions of the present Protocol.

ARTICLE 7

The present Protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary-General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The present Protocol shall come into force as soon as all States which have ratified the Protocol of December 16th, 1920, and also the United States, have deposited their ratifications.

ARTICLE 8

The United States may at any time notify the Secretary-General of the League of Nations that it withdraws its adherence to the Protocol of December 16th, 1920. The Secretary-General shall immediately communicate this notification to all the other States signatories of the Protocol.

In such case, the present Protocol shall cease to be in force as from the receipt by the Secretary-General of the notification by the United States.

On their part, each of the other Contracting States may at any time notify the Secretary-General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16th, 1920. The Secretary-General shall immediately give communication of this notification to each of the States signatories of the present Protocol. The present Protocol shall be considered as ceasing to be in force if and when, within one year from the date of receipt of the said notification, not less than two-thirds of the Contracting States other than the United States shall have notified the Secretary-General of the League of Nations that they desire to withdraw the above-mentioned acceptance.

DONE at ....., the.....

day of ....., 19....., in a single copy, of which the French and English texts shall both be authoritative.